United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

74-2244

United States Court of Appeals

For the Second Circuit

No. 74-2244

FREDERICK E. TINSLEY and ANSTALT DYNOS,

Plaintiffs- Appellees,

—against—

MAVALA, INC. and C. BENJAMIN DINERSTEIN, individually and doing business under the name and style of C-B SALES CO. and BENDYNE, LTD.,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR PLAINTIFFS-APPELLEES

GOLENBOCK AND BARELL,
Attorneys for Plaintiffs- Appellees,
60 East 42nd Street
New York, New York 10017
(212) 986-3300

LEONARD W. WAGMAN,
MICHAEL C. SILBERBERG,
Of Counsel.

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BRIEF FOR PLAINTIFFS-APPELLEES

STATEMENT OF THE ISSUES

1. Was the District Court's appointment of a receiver for defendant Bendyne, Ltd. with powers and functions specifically limited to those necessary to effectuate the interlocutory judgment in this action a proper exercise of discretion where defendants had willfully refused for more than 30 months to comply with the provisions of the judgment requiring them to account for the profits earned by defendant Bendyne and had, during that period, acted to divert and dissipate Bendyne's assets?

2. Did the District Court properly refuse defendants' request to refer the accounting proceeding to a Special Master under Rule 53 F.R.Civ.Pro., where defendants had willfully refused to maintain and produce the records upon which the accounting was to be based and where such a reference would have permitted defendants to continue their dissipation and diversion of defendant Bendyne, Ltd.'s assets?

STATEMENT OF THE CASE

This is an appeal from an order of the United States District Court for the Southern District of New York (Gagliardi, J.) granting plaintiffs-appellees' motion for appointment of a receiver with specified limited powers for defendant Bendyne, Ltd. (225a).*

The receiver was appointed more than two years subsequent to the entry of an interlocutory judgment rendered after full trial in this action -- a judgment which inter alia requires defendants-appellants to account to plaintiff Tinsley for the profits realized from the sale of "Living Nail", a formaldehyde base nail hardner. The interlocutory judgment contemplated a swift accounting utilizing records defendants had been required to keep under the provisions of the preliminary injunction entered at the inception of this action more than ten years ago by District Judge Edward Weinfeld (61a, 14a).

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*References followed by the letter "a" are to "Appellants' Appendix". The title of this document should not be taken to imply any disagreement between the parties as to the contents of the appendix. Indeed, appellees are at a loss to understand why the document was not denominated a "joint appendix". After the appeal was dismissed for lack of prosecution on November 18, 1974, plaintiffs-appellees consented to an order vacating the dismissal and extending defendants-appellants' time to file the record on appeal. At the same time, they also consented to permit appellants to prosecute the appeal on a stipulated record. Based upon conversations with appellants' counsel, appellees were led to believe that the documents enumerated in the stipulation setting forth the record on appeal would also constitute the contents of the joint appendix. Indeed, no separate designation of the contents of the appendix was ever served by appellants pursuant to Rule 30(b) F.R. Civ. Pro.

As the record before the District Court demonstrates in vivid detail, the accounting contemplated by the interlocutory jdugment has been thoroughly frustrated by the conduct of the defendants who failed and refused to maintain the records required under Judge Weinfeld's order, and otherwise prevented any meaningful analysis of Bendyne's financial affairs. After numerous attempts to compel defendants compliance with the interlocutory judgment had failed and when it appeared that defendant Dinerstein was at the same time diverting the profits of "Living Nail" to himself and his other corporations, the Court on the basis of extensive affidavits and after two hearings appointed a receiver.

In fashioning its order, the District Court specifically limited the receiver's powers and functions to those which it considered necessary to effectuate the purposes of the interlocutory judgment -- functions which primarily involve the maintenance of adequate records. Indeed, the Court scrupulously sought to avoid interferring with the day-to-day administration of the corporation and its order ensures that insofar as possible, Bendyne will continue to function free of outside control. The Court's restrained and carefully considered response to defendants' continued and deliberate frustration of its prior orders was more than justified under the circumstances and should be in all respects sustained.

I

DESCRIPTION OF PROCEEDINGS TO AND INCLUDING THE ENTRY OF THE INTERLOCUTORY JUDGMENT ON JANUARY 4, 1972

A. Description of the action and parties

This action was commenced on May 3, 1963 by plaintiff Frederick Tinsley ("Tinsley") a British citizen and Anstalt Dynos S.A. ("Dynos") Tinsley's Lichtenstein corporation against defendants C. Benjamin Dinerstein ("Dinerstein"), his wholly-owned company Bendyne, Ltd. ("Bendyne"), C-B Sales Co. ("C-B Sales") a company in which Dinerstein had a substantial interest, and Mavala, Inc. ("Mavala") a New York corporation which was formed by Tinsley and Dinerstein to carry out their joint venture to market cosmetic products in the United States and in which each held a 50% stock interest.

The complaint alleged that Dinerstein, in breach of his fiduciary duties arising out of the joint venture wrongfully appropriated for himself and his own companies, the patent right to a nail protector shield which was developed for Mavala so that it could secure the approval of the Food and Drug Administration to distribute a nail hardening product known as "Scientifique" in the United States. The complaint was subsequently amended to include allegations that Dinerstein was distributing a nail hardner similar in substance to "Scientifique" under the name "Living Nail" through his corporation Bendyne and had applied for

a patent on the nail protector shield in his own name. Tinsley sought an accounting from defendants of profits from the sale of "Scientifique" and "Living Nail" and an injunction against the transfer of any interest in the patent application or against revealing the formula or its component parts to any person. Tinsley and Dynos also asserted a claim for $80,676 for goods sold and delivered to Mavala (19a).

B. The Preliminary Injunction

Plaintiffs motion for a preliminary injunction was granted by District Judge Edward Weinfeld on January 30, 1964.* Judge Weinfeld's order, among other things,

> (a) enjoined Dinerstein during the pendency of the action from transferring any claimed right in and to the patent application for the nail protector shield to any person, firm or corporation; and
>
> (b) directed Dinerstein "to require Bendyne, Ltd. to keep accurate accounts and records of all sales of 'Living Nail' and all income derived from such sales *** kept in sufficient form to permit a ready accounting of all such transactions." (61a, emphasis supplied)

C. The Interlocutory Judgment

Upon full trial of this action, District Judge Gus Solomon**

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* Judge Weinfeld's decision is reported at 226 F. Supp. 477 (S.E.N.Y., 1964).

** Senior Judge, District of Oregon, sitting by designation.

sustained Tinsley's claim for an accounting by defendants finding that the nail protector had been developed for Mavala and that Dinerstein in disregard of his fiduciary obligations to Mavala and in disregard of his joint venture obligations to Tinsley, had diverted to himself the patent rights and profits which would be accrued from the sales of "Scientifique" in the United States. Additionally, Judge Solomon awarded plaintiffs' judgment for $80,676 on its claim for goods sold and delivered (6a-13a).

In accordance with the Court's decision, an interlocutory judgment was entered on January 4, 1972 which contained the following provisions:

> (a) Plaintiffs were awarded on $80,676.00 together with the interest from May 3, 1963;
>
> (b) the preliminary injunction granted by Judge Weinfeld was made permanent and Dinerstein, Bendyne and any other company controlled or owned by Dinerstein was enjoined from manufacturing, selling or distributing products covered by the joint venture;
>
> (c) Defendants Dinerstein and Bendyne were ordered to pay Mavala the amounts found to be due on the accounting of the profits from the sale of 'Scientifique' and 'Living Nail' and any similar products. Tinsley, however, was given the right of

election to receive direct payment of one-half that sum.

In connection with the accounting, paragraph '5' of the Judgment provided that:

> "5. Defendants shall within ten days after the date of this interlocutory judgment, produce for inspection and copying by plaintiffs, all records and accounts for sales of the product 'Living Nail' and the shield protector and all income derived from such sales, which records they were required to maintain pursuant to the order of District Judge Edward Weinfeld dated February 14, 1964."

The judgment directed the attorneys for the parties, within five days after production of the records in question, to commence meetings for the purpose of determining and agreeing upon the amounts of profits due from the sale of "Living Nail". It specifically provided that "in determining net profits no salary or other compensation shall be deducted for services performed by defendant Dinerstein or any member of his family." The judgment also provided that the parties were to advise the Court within 30 days as to whether they had been able to agree upon the amounts due and if they were unable to agree, the matter was to be referred to a Special Master* (14a-16a).

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* On December 28, 1971, in advance of entry of the interlocutory judgment, defendants sought a stay of its accounting provisions pending appeal (28a). This was denied by the Court on December 31, 1971 (29a). The interlocutory judgment was entered four days later. (14a).

II

PROCEEDINGS SUBSEQUENT TO THE ENTRY OF THE INTERLOCUTORY JUDGMENT

A. Defendants' default in producing the records and plaintiffs' February 10, 1972 motion for contempt.

Under the provisions of the interlocutory judgment, defendants were required to produce the records which they had been directed to maintain by Justice Weinfeld within ten days of entry or by January 14, 1972. Defendants did not produce any records on that date and failed to return several phone calls placed by plaintiffs' attorneys. On January 18, 1972, plaintiffs' attorneys hand-delivered a letter to defendants' attorney, Michael Stanton, advising defendants that they were in default of the provisions of paragraph 5 of the interlocutory judgment and that unless the records specified were produced on or before Friday, January 21, 1972, plaintiffs would have no alternative but to seek relief from the Court (22a, 31a).

Defendants did not respond to this letter until January 28, 1972. On that date, their attorney, Mr. Stanton, wrote and merely offered to produce Bendyne's income tax returns for plaintiffs' inspection. The letter made no reference whatever to the "accounts and records of all sales of 'Living Nail' and all income derived from such sales" which Judge Weinfeld had ordered them to maintain in 1964 in "sufficient form to permit a ready accounting"

and which they were required to produce by the clear and unambiguous language of paragraph 5. Moreover, Mr. Stanton's letter suggested that he had "some difficulties" in even obtaining the tax returns (22a-23a, 33a).

On February 1, 1972, plaintiffs' attorneys again by hand-delivered letter, advised defendants that the proferred production of income tax returns clearly failed to comport with the provisions of paragraph 5 of the interlocutory judgment and that unless the required records were produced by the close of business on Friday, February 4, 1972, plaintiffs would promptly seek an order holding defendants in contempt* (34a). Defendants did not produce any records on February 4, 1972 nor did they even respond to plaintiffs' letter (23a, 34a).

Accordingly, plaintiffs on February 10, 1972, by order to show cause, moved to hold defendants in contempt pursuant to local Civil Rule 14 (17a). The motion which was returnable on February 15, 1972 was adjourned at defendants' request to give them yet another opportunity to voluntarily comply with the order of the Court (37a-38a).

Defendants thereafter produced records which did not comport with the directives of Judge Weinfeld and the mandate of

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* Significantly, defendants do not contend in their brief that production of these income tax records represented compliance with paragraph 5 of the interlocutory judgment. (See defendants' brief, pp. 4-5).

the interlocutory judgment. They consisted merely of income tax returns for defendant Bendyne showing substantial losses for the years since 1964 and a general ledger which contained only summary entries of sales and expenses. There was no documentation whatever for the amounts of sales of "Living Nail" or for the amount and nature of expenses and disbursements claimed to have been incurred in connection with such sales. When plaintiffs demanded production of the books of original entry including the accounts payable and accounts receivable ledgers, defendants refused to produce them unless they were permitted to mask over the identity of Bendyne's customers claiming that plaintiff Tinsley might utilize this information to compete against defendants Bendyne and Dinerstein. In order to expedite matters, plaintiffs consented to this arrangement and the contempt motion was withdrawn on June 2, 1972 upon defendants' representation that the records would be produced the following week (36a-37a).

B. The September 1, 1972 ruling by the Court rejecting defendants' spurious claims of "confidentiality".

On June 8, 1972, defendants purported to produce the accounts payable and accounts receivable ledgers for defendant Bendyne at the offices of defendants' counsel. Examination of these records quickly revealed, however, that defendants had taken plaintiffs' agreement to permit them to mask over the identity of customers as a license to mask over all entries in the documents

rendering them a series of unidentified and unintelligible numbers. They even masked over the entries in the accounts payable ledger.

Once again, plaintiffs' attorneys in an effort to avoid another motion to the Court and further delay in the accounting, offered to enter into a customary protective order under which the documents would be produced upon their agreement not to reveal the names of defendants' customers to plaintiff Tinsley without defendants' prior consent. A copy of a proposed stipulation embodying this reasonable proposal was sent to defendants on June 23, 1972. Defendants never responded to this letter and refused to return several telephone calls thereafter. Accordingly, plaintiffs were required to make yet another application to the Court to seek relief. On August 28, 1972, they requested an immediate conference with the Court for a ruling on defendants' claim of conficentiality pointing out that defendants had "effectively brought the accounting proceedings to a halt" and that plaintiffs had "exhausted all means of obtaining voluntary production of the records..." (36a-39a).

In opposing this application, defendants who had effectively denied plaintiffs access to any meaningful records of Bendyne, nevertheless sought to suggest to the Court that "it is quite obvious that there have been no profits arising out of the sale of 'Living Nail'... [and that] counsel are in a position

at this time to stipulate to the fact that no profits have been earned from the sales of 'Living Nail' or the adhesive protector shield by the defendants" (43a).

On September 1, 1972, the parties appeared before Judge Gagliardi. At that time, the Court rejecting defendants' spurious claims of privilege and their equally spurious claim that the parties were "in a position ... to stipulate ... that no profits have been earned from the sale of Living Nail..." directed defendants to produce the records with the masking removed within ten days (107a-108a)*.

C. Defendants' motion to modify the interlocutory judgment and to terminate the accounting on the ground of "newly discovered evidence".

While plaintiffs were proceeding with their analysis of the records which were finally produced nine months after the entry of the interlocutory judgment, and only after two applications to the Court, defendants sought to terminate the accounting by moving to modify the interlocutory judgment on the ground of "newly discovered evidence". The motion was predicated upon claims that the nail protector shield was unpatentable and that "Living Nail" and "Scientifique" were chemically dissimilar (44a) -- claims which had been specifically rejected by Judge Solomon at the time of defendants' December 28, 1971 application to stay enforcement of the

* Although plaintiffs in a letter to the Court reiterated their willingness to enter into a stipulation similar to that they transmitted to defendants' counsel on June 23, 1972 (39a), defendants thereafter never requested them to do so and the records were not produced subject to the terms of a protective order. Any suggestion to the contrary in defendants' brief is unsupported by the record.

interlocutory judgment (53a, 70a-72a).* Judge Gagliardi denied the motion finding it to be merely a "frivolous attempt...to delay the conclusion of this litigation". (87a)**

D. The inadequacy of the records ultimately produced by defendants.

The unmasked books and records ultimately produced by defendants were not in the form mandated by Judge Weinfeld's 1964 order and were palpably insufficient to enable plaintiffs to determine the amount of profits realized from the sale of "Living Nail".

While purporting to show an operating loss of $57,000 based upon net sales of $490,000 in the nine years ending May 1972, the records on their face were incomplete and contained critical omissions and apparent alterations (105a-106a, 108a). For example, during the entire nine year period ending May 1972 there were no entries reflecting the purchase of a single raw

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* See Supra page 8

** The motion far from demonstrating "newly discovered evidence" served only to demonstrate Dinerstein's complete lack of credibility since it revealed that he had clearly sought to mislead both Judge Weinfeld and Judge Gagliardi as to the status of patent rights with respect to the nail protector shield. Thus, Dinerstein swore in his affidavit submitted in support of the motion that his application for a patent on the nail protector shield was rejected by the United States Patent Office in April of 1964 on the grounds that it had been anticipated by a prior patent issued in 1943 to an inventor named Mabry (46a-47a). Dinerstein, however, failed to disclose to the Court both in this affidavit and in a prior affidavit submitted to Judge Weinfeld in 1964 that he in fact filed three applications at that time, two of which resulted in the issuance of patents numbers 3,245,418 and 3,382,878 (57a, 74a, 84a). The

material utilized to manufacture "Living Nail" and no entries indicating where or how the company packaged or bottled its product. The pattern of sales of "Living Nail" reflected in the books was also extremely erratic with sales to certain customers ceasing in 1964 after entry of the preliminary injunction by Judge Weinfeld (112a). Information with respect to inventories was made available for only certain years and pages of the subsidiary account receivable and payable ledgers appeared to have been rewritten (108a-109a).

The records also reflected numerous unexplained transactions between Bendyne, Dinerstein and Dinerstein's other companies, including Bendyne Products, Inc., Bendol, Inc., C-B Sales Co., and Benesco, which at various times operated from Bendyne's offices. (109a). Moreover, notwithstanding Dinerstein's representation to the Court that since 1964, neither he nor his wife had drawn any salary or other compensation from Bendyne (42a), the records reflected numerous charges to the corporation for what appeared to be Dinerstein's purely personal expenses such as payments for automobile insurance, garage service, rental payments for his apartment, and wines and liquors. The records also reflected numerous and unexplained withdrawals of cash by Dinerstein (109a-112a). These transactions which continued well

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[footnote continued]

nail protector shield which Judge Solomon found had been diverted by Dinerstein to his own use and which continues to be distributed with "Living Nail" is manufactured pursuant to this latter patent (57a-59a).

past the entry of the interlocutory judgment suggested a form of "compensation" to Dinerstein which under the terms of the interlocutory judgment was to be excluded from any determination of the net profits of "Living Nail" (15a).

In an effort to obtain answers to the numerous questions raised by these records, plaintiffs propounded interrogatories to defendants on March 14, 1973. Among other things, the interrogatories sought to determine whether and on what basis office expenses were apportioned between Bendyne and Dinerstein's other companies as well as the basis for numerous payments to Dinerstein reflected on the companies books (88a-99a). Answers to these interrogatories were due on April 14, 1973. Defendants, continuing their pattern of obstruction, simply refused to answer them (114a).

At this time, plaintiffs learned of the pendency of a proceeding in New York State Supreme Court for the dissolution of C-B Sales -- a proceeding brought by Dinerstein's brother Charles to dissolve their partnership in that company (the "State Court proceeding"). Plaintiffs' examination of the court file in that proceeding confirmed the strong inference raised by the records theretofore produced that Bendyne's assets had been diverted to the use and benefit of Dinerstein's other companies. Thus, in affidavits submitted to the Court in that proceeding, Dinerstein stated that Bendyne had incurred substantial expenses

on behalf of C-B Sales for rent, utilities, xerox services, fire and liability insurance, postage meter services and wines and liquors. Notwithstanding his representation to plaintiffs that neither he nor his wife had drawn any salary or other compensation from Bendyne (42a) Dinerstein stated in the affidavits that Bendyne had paid salaries to him and his wife for work performed for C-B Sales (121a-132a). The record in the State Court proceeding also revealed that immediately prior to the inception of payments by Bendyne for automobile insurance, parking and wines and liquors, the court-appointed receiver for C-B Sales had challenged as improper, similar payments to Dinerstein by that company (112a). Finally, it revealed that Dinerstein had on February 21, 1973 been ordered to be committed to New York County Jail for willfully refusing to comply with orders of the State Court directing him to furnish books and records to the receiver in that proceeding (117a-120a).

E. Plaintiffs' motion for appointment of a receiver and for an order compelling defendants to answer interrogatories.

In light of the patent inadequacy of the records produced, defendants' continued obstruction of the accounting including their absolute refusal to answer the interrogatories which sought information with respect to the enormous gaps and questionable transactions appearing on the face of the records, and in light of what now appeared to be a clear and demonstrable pattern by defendants of diverting Bendyne's assets to Dinerstein and his other corporations, plaintiffs, on June 5, 1973, moved for an order

appointing a receiver for defendant Bendyne pending completion of the accounting and entry of final judgment and for an order compelling defendants to answer the interrogatories (100a).

In an affidavit submitted in support of the motion, plaintiffs detailed for the Court the problems which confronted them in attempting to analyze the inadequate records produced by defendants and defendants' complete refusal to provide further information. They also detailed the evidence of dissipation and diversion of Bendyne's assets in the face of the incredible claims by Dinerstein that neither he nor his wife had received salary or compensation from Bendyne for ten years. Plaintiffs annexed to their moving affidavit copies of verified proofs of claim and affidavits of Dinerstein which had been submitted in the State Court proceeding in which he had conceded the use of Bendyne funds for the benefit of his other company, C-B Sales. Plaintiffs also annexed the order of Justice Birdie Amsterdam filed February 21, 1973, directing Dinerstein to be imprisoned (101a-112a).

Defendants' response was to file a brief affidavit of defendant Dinerstein in which Dinerstein never specifically denied use of Bendyne's assets in the manner described by plaintiffs. Instead, he sought to sweep them aside by his bald assertion that they were "undocumented and unfounded". He promised that any questions would be "clearly and accurately explained" when answers to the interrogatories were filed. No excuse whatever was advanced for defendants' refusal to answer the interrogatories prior to that time. (133a-137a).

Plaintiffs' motion came on for hearing before Judge Gagliardi on July 31, 1973. At that time, the court in an exercise of judicial largess beyond anything warranted under the circumstances granted defendants yet another opportunity to comply with their obligations under the interlocutory judgment. Thus, the Court directed defendants to file answers to plaintiffs' interrogatories by August 13, 1973. It specifically stated, however, that this relief was without prejudice to the remaining portions of plaintiffs' motion seeking the appointment of a receiver. It directed plaintiffs to advise the Court upon receipt of the interrogatories, as to the effect of the answers upon that portion of the motion seeking appointment of a receiver (138a-139a).

F. Service of defendants' answers to interrogatories and renewal of plaintiffs' motion for a receiver.

Defendants' answers which were verified by defendant Dinerstein, were served on August 13, 1973 (166a).*

In an affidavit filed with the Court on September 4, 1973, plaintiffs advised the Court that defendants' answers taken together with other information obtained from the State Court proceeding merely emphasized (i) the inadequacy of the records produced, (ii) the urgent need to appoint a receiver to prevent the complete frustration of the interlocutory judgment and dissipation of profits from the sale of "Living Nail" and (iii)

* Defendants did not file the answers with the Court until September 10, 1973 (4a).

defendant Dinerstein's utter lack of veracity (167a-177a).

For example, defendants in their answers to interrogatories denied under oath that C-B Sales had ever utilized office space paid for with Bendyne funds (143a-145a). This directly contradicted sworn statements made by Dinerstein in the State Court proceeding in which he advised the Court that C-B Sales had utilized "a substantial portion" of the Bendyne premises which he valued at 75% of the monthly rental (171a-172a, 121a). The answers to interrogatories also took the position that there had been no utilization of Bendyne space by Dinerstein's other company, Bendyne Products, Inc. since November 1966 when that company became "dormant" and that prior to that time, Bendyne Products, Inc. had merely "shared a desk" at the Bendyne premises (154a). In answer to the same interrogatories, however, defendants conceded that Bendyne, Ltd. had in the seven years since Bendyne Products had become allegedly "dormant" continued to pay workmen's compensation, general liability and property insurance on its behalf (146a-147a). The Court was also advised that this allegedly "dormant" corporation continued to maintain a listing in the Manhattan telephone directory (172a, 185a).

Defendants also denied in answers to interrogatories, that any employees of Bendyne, Ltd. performed services for Dinerstein's other companies or that Bendyne had paid charges

on their behalf for telephone, cleaning service, electricity, trucking and shipping (145a-146a). This was directly contradicted by Dinerstein's sworn statements in the State Court proceeding where he said that "a clerical employee of Bendyne, Ltd. performed substantial amounts of services for the benefit of C-B Sales Co."* and that Bendyne had supplied other services such as telephone, freight, postage and messengers to C-B Sales and Bendol (173a, 124a, 122a-130a).

In answers to interrogatories, defendants also denied that "Living Nail" was sold by any of Dinerstein's other companies (175a, 150a). In the State Court proceeding, Dinerstein had filed a verified account which showed that from September 1963 to June 1969 Bendyne had delivered $14,544 worth of "Living Nail" to C-B Sales "for resale" (175a, 129a, 122a).

Plaintiffs also advised the Court of new evidence which had come to their attention from the State Court proceeding which revealed in astonishing detail the extent to which Dinerstein had been utilizing Bendyne funds in payment for his purely personal

*Indicative of the enormous difficulties that will ultimately be faced in unraveling this morass of tangled relationships is Dinerstein's statement in the State Court proceeding that he had not attempted to allocate the value of services performed by this employee as between Bendyne and C-B Sales in view of the "difficulty" in doing so (130a). It should also be noted that presumably for the same reason, defendants were unable in the answers to interrogatories to provide any allocations for the various insurance policies covering Bendyne, Ltd., C-B Sales, and Bendyne Products, Inc. (146a-147a). Although they advised the Court that they would file a supplemental answer to this interrogatory in which they would make such an allocation, they have failed to do so in the 18 months since the answers to the interrogatories were filed.

expenses while at the same time denying in this proceeding that he had received salary or other compensation. Thus, the Court was advised of the following deposition testimony given by Mr. Dinerstein:

> "Q. Mr. Dinerstein, at the last examination I asked you how you paid your rent at your present premises, and you agreed to take the matter up in consultation with your wife and advise, How did you pay your rent during the month of April? A. From Bendyne, Ltd.
>
> "Q. Did you pay by check? A. Yes.
>
> "Q. Do you pay any other personal expenses from Bendyne, Ltd.? A. Yes.
>
> "Q. What are the other expenses you paid during months of January through April of this year? What was the nature of the expenses you paid from Bendyne, Ltd.? A. My daily expenses.
>
> "Q. Does that include your personal insurance? A. Yes.
>
> "Q. Does it include your entertainment expenses, personal entertainment expenses? A. Yes.
>
> "Q. Does it include your automobile? A. Yes.
>
> "Q. Does it include your medical expenses? A. Yes.
>
> "Q. Your clothing expenses? A. Yes.
>
> "Q. Transportation? A. Yes.
>
> "Q. Telephone? A. Yes.
>
> "Q. Gas and electricity? A. Yes."
> (168a-169a, 179a)

The Court was further advised that Dinerstein had utilized Bendyne funds to pay $2,305.39 bill to Appeal Printing Company for printing of briefs and records in the State Court proceeding to

which Bendyne was not a party and that Bendyne paid judgments obtained against him personally as a result of transactions entered into by C-B Sales (170a)* In addition, the Court was advised that there were also $38,000 in "miscellaneous" charges for the period 1964 through 1972 against the books of Bendyne including meals at "21" Club, New York Hilton, Drake Hotel, Longchamps, Toots Shor's and the Plaza. When questioned in the State Court proceeding as to similar charges on the books of C-B Sales Dinerstein took the position that these were "business expenses" but admitted that he kept no records as to who was "entertained" on these occasions (169a-170a, 180a).**

Finally, the Court was apprised that in answers to interrogatories Dinerstein had for the first time revealed that assets of defendant Bendyne were utilized for the manufacture and marketing of products other than "Living Nail" and that since 1968 the corporation had been marketing an aerosol foot spray

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* These judgments included a judgment in the amount of $3,225.80 entered against Dinerstein by Coasmire, Inc. in New York Civil Court for goods sold and delivered to C-B Sales; a judgment in the amount of $63,221.00 entered against Dinerstein by Olin of New York, Inc. in New York Civil Court based upon rental of a station wagon an automobile for delivery of merchandise to customers of C-B Sales; a judgment in the amount of $1,323.52 entered against Dinerstein by Royal Metal Corporation for goods sold and delivered to C-B Sales. In addition, the Bank of Commerce levied upon the bank account of defendant Bendyne in order to effect repayment of the loan by the bank to C-B Sales Co.

** Dinerstein also testified in that proceeding that he had "walked around" with $40,000 in cash withdrawn from a savings account he secreted from the receiver and had "spent it". (177a, 187a-188a).

under the trade name "Living Steps" (151a). The Court was advised that the books and records that had been produced to date did not reflect any separation of business expenses between these two produces (175a).

In light of these facts, plaintiffs' attorneys informed the Court that it would take months of laborious analysis of Bendyne's checkbook and other records which had not been produced, and extensive deposition testimony of Mr. Dinerstein to even begin to reconstruct the kinds of records contemplated by Judge Weinfeld's 1964 order and to trace the full extent to which Dinerstein had diverted what appeared to be thousands of dollars in Bendyne funds to his own personal benefit and the benefit of his other corporations. Plaintiffs' attorneys pointed out to the Court that in the meantime, Dinerstein would be free to continue to dissipate and divert these funds which constituted trust monies held for Tinsley's benefit under the interlocutory judgment. Accordingly, they urged appointment of a receiver without further delay (176a-177a).

On September 19, 1973, Dinerstein filed an affidavit in opposition in which he offered some wildly improbably "explanations" for the transactions described above. Conceding for the first time that he had utilized corporation funds to pay his personal living expenses, he now claimed that these were debited against outstanding "loans" which he made to Bendyne in the amount of $26,500 (191a). No documentation whatever was given for these "loans". No notes were produced, there was no claimed repayment schedule,

nor were there any entries in the Bendyne books to reflect payment of interest (203a-204a). As plaintiffs' attorneys advised the Court in a reply affidavit filed on October 1, 1973, the "loan" transactions far from justifying Bendyne's payment of Dinerstein's admittedly personal expenses merely demonstrated the extent to which he has been able to unilaterally manipulate the form and substance of Bendyne's transactions to plaintiffs' detriment. Thus, they apprised the Court of the following pencilled notation by Dinerstein's accountant in the worksheets which had been produced for plaintiffs' inspection:

> "I spoke to B. Dinerstein about large amounts of checks to cash -- charge large amounts to loan account and small amounts to selling expenses [!]." (204a)

Dinerstein also sought to "explain" other inconsistencies between answers to interrogatories and sworn statements in the State Court proceeding by arguing that he had misunderstood the interrogatories in question or in one instance, had "forgotten" particular transactions (193a-195a).*

*Among Dinerstein's other "explanations" was the explanation given with respect to the nearly $10,000 in judgments which had been paid by Bendyne on behalf of C-B Sales Co. Thus, Dinerstein now claimed in his affidavits in the State Court proceeding had been mistaken and that these items were paid from his personal account at the Bank of Commerce (192a-193a). While seeking to "apologize" to plaintiffs and to the Court for any "confusion" caused by the mistake, he glaringly omitted to state that he had taken steps to amend the verified proof of claim in the State Court proceeding nor did he even attempt to provide the Court and plaintiffs with copies of the checks which he claimed were paid from his own account.

In an obvious and desperate attempt to terminate the accounting and prevent plaintiffs from obtaining the information necessary to make an intelligent assessment of Bendyne's financial affairs, defendants urged that the Court deny the motion and to immediately refer the matter to a Special Master leaving Dinerstein free in the interim to continue his diversion of monies from the corporate till (197a).

On October 6, 1973, the matter came on for hearing before Judge Gagliardi at which time the parties appeared by counsel and argued the motions extensively (210a).

After carefully deliberating the matter, the Court on March 13, 1974 rejected defendants' argument that the matter be referred to a Special Master and entered an order appointing Otto C. Jeager as receiver of the corporation (209a). Defendants immediately filed an appeal to this Court (213a). Judge Jeager, however, declined the appointment in view of the "time and energy" that would be involved in the performance of these duties (214a).

On June 28, 1974, the parties again appeared before the Court with respect to a renewed application by plaintiffs for a receiver (221a,214a-215a). At that time, the Court was advised by defendants that Bendyne had finally begun to show a profit. In light of that fact the Court expressed reluctance to interfere with the corporation's operations (220a-221a). Accordingly, plaintiffs requested an opportunity to submit an amended order for appointment of a receiver for defendant Bendyne so as to limit the receiver's

powers to accomplish only that which was necessary to the effectuation of plaintiffs' interlocutory judgment (217a-218a, 221a-222a).

Thereafter, plaintiffs submitted a proposed order for the appointment of a receiver with "limited powers" to (i) take charge of the books and records of the corporation; (ii) supervise the making of entries; (iii) prepare reports to the Court as to the amount of Bendyne's sales, the nature of its transactions with defendant Dinerstein and his other corporations and the amount of net profits from the sale of "Living Nail". The receiver, however, was not under the terms of the proposed order authorized or directed to conduct the day-to-day affairs of Bendyne and in this respect, it was clear that the corporation would continue to function as before. The proposed order established a procedure by which the receiver could, if necessary, immediately move to halt diversion of assets from defendant Bendyne but only by application to the Court. (217a-218a).

In opposing, defendants once again urged referral to a Special Master (219a-220a).

On August 29, 1974, the Court again rejected defendants' contention that the matter was ripe for referral to a Special Master and adopted plaintiffs' proposal in its totality. It appointed Michael Devine, Jr., as receiver with the "limited powers necessary to supervise and ensure the maintenance of accurate books and records of the corporation and the preparation of reports to the Court." The Court specifically noted in the order that appointment of the receiver was necessary:

"to prevent the complete and total frustration of the interlocutory judgment and the continued dissipation and diversion of the income and profits from the sale of 'Living Nail' and to protect plaintiffs one-half interest in the income and profits from the sale of 'Living Nail' by ensuring the maintenance of accurate financial records." (226a)

Defendants thereafter filed the instant appeal (231a).

POINT I

THE ORDER OF THE COURT BELOW APPOINTING A RECEIVER WITH LIMITED POWERS FOR DEFENDANT BENDYNE, LTD. WAS A NECESSARY AND PROPER EXERCISE OF DISCRETION TO PREVENT DEFENDANTS' COMPLETE AND TOTAL FRUSTRATION OF THE INTERLOCUTORY JUDGMENT AND SHOULD BE IN ALL RESPECTS AFFIRMED

In their brief on appeal, defendants do not challenge the jurisdiction of the Court to appoint a receiver for defendant Bendyne nor the standing of plaintiffs to request this relief. Instead, defendants' sole argument is that "plaintiffs did not sustain the very heavy burden of proof placed upon a party seeking the appointment of a receiver" (Appellants' brief, p.9).

Defendants' argument is directly contradicted by the record facts which compel the conclusion that plaintiffs more than discharged their burden of demonstrating their entitlement to the equitable relief granted by the Court. Indeed, the receiver was appointed upon an overwhelming showing of contumacious refusal by defendants to comply with the interlocutory judgment and upon an equally overwhelming demonstration of waste and diversion of defendant Bendyne's assets to plaintiff Tinsley's detriment. (See discussion pp. 9-28 supra). Under such circumstances, the appointment of a receiver by the Court was a proper exercise of discretion. See e.g., Tanzer v. Huffines, 408 F.2d 42 (3rd Cir., 1969); Ferguson v. Tabah, 288 F.2d 665 (1961).

Defendants' argument moreover ignores the efforts by the Court to limit the powers of the receiver to those necessary to effectuate the provisions of the interlocutory judgment and to permit defendant Bendyne insofar as possible, to continue to function free from outside control. Indeed, the receiver is not authorized or directed under the order to conduct Bendyne's day-to-day affairs and in this respect, the corporation will continue to function as before. The receiver's authority is instead specifically limited to correcting past abuses in record keeping and in unraveling the maze of inter-corporate transactions and self-dealing which has prevented the accounting to date. Even if the receiver, in the course of his duties, finds diversion of corporate assets, he cannot under the terms of the order, himself act to halt such a diversion. Rather, he must bring the matter to the attention of the Court (225a-230a).

Accordingly, the relief fashioned by Judge Gagliardi, cannot, as suggested by defendants, be characterized as "drastic" (See defendants' brief, pp.8-9). For that reason, the cases cited by defendants each of which deal with more conventional receiverships under which the receiver is invested with complete control of the corporation's affairs are distinguishable. Moreover, these cases far from supporting defendants' position merely emphasize the correctness of the ruling by the Court below since they make clear that the Court on the record before it would have been justified in appointing a receiver with far wider powers.

Thus, defendants heavily rely upon Maxwell v. Enterprise Wallpaper Mfg. Co., 131 F.2d 400 (3rd Cir., 1942), suggesting that it is"closely analogous to the instant case" (Appellants' brief, p.10). Examination of that opinion reveals that the facts are not analogous at all. Unlike the present action where the receiver was appointed more than two years subsequent to a judgment rendered after trial and after two full hearings by the Court, Maxwell involved the ex parte appointment of a receiver on plaintiff's motion made at the inception of the action. In reversing the District Court's order appointing the receiver, the Third Circuit suggested that there was a far higher burden to be met where a party seeks the ex parte appointment of a receiver:

> "The caution which should surround the appointment of a receiver is hightened when such appointment is sought peremptorily in a proceeding in which the opponent has neither notice nor an opportunity to be heard." 131 F.2d at 403.

The Court also specifically found that plaintiff in Maxwell had failed to demonstrate that the acts of corporate waste were continuing so as to require equitable relief or receivership. 131 F.2d at 404.

At bar, defendants cannot complain that they had "neither notice nor an opportunity to be heard" as the defendant in Maxwell. Additionally, the record is unrefuted that the acts of corporate waste were continuing and defendants in effect conceded that they were themselves unable to unravel the entangled affairs of Dinerstein's corporations (See p. 21 supra).

Defendants' reliance upon Wickes v. Belgian American Educational Foundation, Inc., 266 F. Supp. (S.D.N.Y., 1967), is similarly misplaced. Wickes also involved an application for appointment of a receiver which was made at the outset of the action -- one which was made together with a motion for a preliminary injunction. Judge Croake in denying both motions found that the plaintiff had failed to demonstrate a probability of success on the merits or the likelihood of irreparable injury. 266 F. Supp. at 41. Here, the plaintiffs have already succeeded on the merits of the litigation and the Court found irreparable injury noting in its order that the receiver was necessary to prevent the "complete and total frustration of the interlocutory judgment and continued dissipation and diversion of the income and profits from the sale of 'Living Nail'" (226a).

Defendants have wisely refrained from discussing the facts in the other cases cited in their brief such as Chambers v. Blickle Ford Sales, Inc., 313 F.2d 252 (2nd Cir., 1963); Ferguson v. Tabah, 288 F.2d 665 (2nd Cir., 1961); and Glassner v. Kaufman, 19 A.D. 2d 885 244 N.Y.S. 2d 450 (1st Dept., 1963). In Chambers this Court affirmed the denial of a motion for a receiver on the grounds that jurisdictional pre-requisites had not been met. Here, defendants do not even contest jurisdiction. In Ferguson, the appointment of a receiver was confirmed even where the Court found the pattern of corporate dishonesty "quite subtle", 288 F.2d at 674. Here, there is nothing "subtle" about defendants' actions. In Glassner, there was a specific finding by the Appellate Court that the plaintiff had failed to demonstrate any danger of dissipation of the assets of the

business for which a receiver had been sought.

Defendants also urge as a basis for reversal, that the affidavits before the District Court were "conflicting". (See Appellants' brief, pp.7,9) This argument is strained indeed. Clearly, there was no "conflict" with respect to the underlying facts which showed that (i) defendants had deliberately defied Judge Weinfeld's order directing them to maintain records upon which the accounting was to be based; (ii) they had, through a variety of tactics, frustrated completion of the accounting for more than 30 months since entry of the interlocutory judgment; and (iii) had utilized assets of defendant Bendyne for Dinerstein's personal benefit.

The only facts upon which there was arguably any real conflict was whether the monies withdrawn by Dinerstein from Bendyne either in cash or in payment of personal obligations were in repayment of alleged "loans" as he contended. Under the circumstances, where Dinerstein had failed on several occasions to produce any documentation for the "loans" and where plaintiffs had shown Dinerstein's affidavits to be demonstrably false in numerous other respects, it is submitted that the Court was more than justified in rejecting Dinerstein's characterization of the transactions and appointing the receiver, especially where the entry of the order did not by its terms prevent these questionable transactions from continuing. Indeed, under the specific terms of the order, the receiver can only bring a halt to such transactions by further application to the Court.

In view of the foregoing, defendants have utterly failed to demonstrate that Judge Gagliardi's order appointing a receiver with limited powers was unwarranted or ill-considered. The the contrary, it was a necessary and proper exercise of discretion to prevent defendants' complete and total frustration of the interlocutory judgment and should be in all respects sustained.

POINT II

THE COURT SHOULD REJECT DEFENDANTS' ALTERNATIVE REQUEST THAT THE ORDER BE "MODIFIED" TO CONVERT THE RECEIVER TO A "SPECIAL MASTER"

As an alternative to reversal, defendants urge that the order below "should be modified to provide for the appointment of Michael Devine as Special Master rather than as Receiver of Bendyne" (Defendants' Brief, pp.11-12). As a basis for this argument, they urge in substance that Judge Gagliardi improperly rejected their several requests that he refer the matter to a Special Master under the provisions of paragraph 5 of the interlocutory judgment. (See supra pp.26-27).

As Judge Gagliardi implicitly recognized in denying defendants' request to refer the matter to a Special Master, paragraph 5 of the interlocutory judgment by its terms contemplated such a reference only after the "accurate accounts and records" which defendants had been directed to keep by Judge Weinfeld in 1964 had been produced and plaintiffs had been given a sufficient opportunity to study them. Since the records were not produced, it was clear that reference to a Special Master was unwarranted. Moreover, it was equally clear that such a reference would substantially prejudice plaintiffs since it would have in effect terminated production of defendants' records and thereby would have deprived plaintiffs of information necessary to dispute defendants' assertions in proceedings before the Special Master that there had been no profits from the sale of "Living Nail". The reference

would have also left defendants free to continue their diversion and dissipation of the assets of the corporation. Accordingly, the Court below properly rejected defendants' requests which we submit were little more than a transparent device to terminate the accounting and avoid disgorging the profits realized from the sale of "Living Nail".

For these same reasons, this Court should refuse to modify the order below in the manner requested by defendants. Certainly, the functions contemplated for the receiver under Judge Gagliardi's order are far broader than that contemplated for Masters under Rule 53 F.R.Civ.Pro. and entail administration of Bendyne's record keeping as well as other administrative functions wholly incompatable with the traditional nature of the office of Special Master. Obviously, Judge Gagliardi was aware of these distinctions when he twice refused to order such a reference.

It should also be noted that defendants have suggested, as a reason for converting the appointment of the receiver to that of a Special Master, that the creation of a receiver permits "plaintiffs to use such information to improperly compete with Bendyne in the nail hardening field in which the parties have been in intense competition for over 11 years". (Defendants' brief, p.13). Nowhere do defendants elaborate as to the nature of the so-called "information" which they contend plaintiffs will improperly use. In any event, such an argument is completely unsupported by anything in the record before the District Court and in this respect, exceeds the bounds of legitimate advocacy.

CONCLUSION

For the above stated reasons, the carefully considered order of the District Court appointing Michael Devine, Esq. as receiver with limited powers for defendant Bendyne, Ltd. should in all respects be affirmed.

GOLENBOCK AND BARELL
Attorneys for Plaintiffs-Appellees
60 East 42nd Street
New York, New York 10017

Leonard W. Wagman
Michael C. Silberberg

Of Counsel.

Brief
20 February 5

Weil, Gotshal & Manges
Attys for Defts Appts

LEX PRINTING COMPANY, INC., 421 HUDSON ST., N.Y. 10014—691-2300
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